NO. 83-1427

IN THE
SUPREME COURT OF THE UNITED STATES
FEBRUARY TERM, 1984

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CITY OF PLEASANTON, ET AL.,
Appellants,

vs.

TRAVIS J. SMITH, ET AL.,
Appellees,

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

* * * * *

MOTION TO DISMISS

* * * * *

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NO. 83-1422

IN THE
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FEBRUARY TERM, 1984

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CITY OF PLEASANTON, ET AL.,
Appellants,

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* * * * *

MOTION TO DISMISS

Pursuant to Rule 16(1)(a) of the Rules of the Supreme Court of the United States, Appellees move the Court to dismiss the appeal herein on the ground that the appeal is not within the jurisdiction of this Court as hereinafter set forth.

STATEMENT

This is an appeal from a judgment of the United States Court for the Western District of Texas which granted an injunction from removing the plaintiff below, Travis J. Smith, from the office of Councilman, City Council, City of Pleasanton, Texas, on the basis of a recall election held against said Travis J. Smith in the City of Pleasanton, Texas, on or about August 13, 1983, and which also dismissed defendant below, Clem Titzman from said cause due to the mootness of the cause as to him.

The facts underlying the appeal are as follows: Three City Councilmen filed a complaint seeking to halt or declare invalid an election held in the City of Pleasanton to recall one of the plaintiffs, City Councilman Travis J. Smith. Councilmen, Smith and the only two Hispanic members of the Council, Abraham Saenz and Johnny Bosquez, (all Appellants herein) frequently voted together, par-

ticularly on matters of interest to the Hispanic community, and a recall movement was mounted to remove Smith from office, thereby eliminating the de facto Hispanic majority from the City Council and perpetuating the rule of the Anglo majority. Councilmen Smith, Saenz and Bosquez instituted this suit, claiming that the recall provision contained in Article 12 of the City's newly adopted Home Rule Charter had not been precleared by the Justice Department pursuant to the Voting Rights Act and that, therefore, the result of the recall election which took place on August 13, 1983, was void.

The United States District Court for the Western District of Texas comprised of a three-judge panel agreed with plaintiffs, the recall election was set aside and Smith retained his office. The City of Pleasanton elected not to appeal. Appellants, Danny Qualls and Clem Titzman, now attempt to perfect this appeal. Both Appellants were

joined in the suit only in their representative capacities as election judge and as Mayor. No damages or other relief whatsoever were granted against Appellant Titzman. The only relief granted against Appellant Qualls was to enjoin him in his capacity as Mayor from removing Appellee Smith from office.

ARGUMENT

The appeal herein is not within the jurisdiction of this Court because it was not pursued in conformity with Rule 10.4, Supreme Court Rules, in that Appellants are not true parties and have no basis upon which to appeal. The cases cited hereinafter fully establish the position of appellee.

Appellants have no basis upon which to appeal. They lack a status as real parties in interest; they lack a capacity to sue; they lack standing to appeal. In short, appellants have no special injury on which to be heard and no relief may be fashioned to aid them.

Appellants fail to meet the standard of a "real party in interest" so defined in the Federal Rules of Civil Procedure, R.17(2), which states in part:

> "Every action shall be prosecuted in the name of the real party in interest."

Professor Moore, in his work on federal practice stated:

> "Cases constituting the real party in interest provision can be more easily understood if its born in mind that the true meaning of the real party in interest may be summarized as follows: An action shall be prosecuted in the name of the party who by the substantive law, has the right sought to be enforced." 3A J. Moore, FEDERAL PRACTICE, ¶17.07 (2d Ed. 1969).

Moore's analysis has found general acceptance in the courts. See Young v. Powell, 197 F.2d 147, 150, n.10 (5th Cir.), cert.

denied, 339 U.S. 948 (1950); Dubuque Stone Products v. Fred L. Grey Co., 356 F.2d 718, 723 (8th Cir. 1970); See also Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, Civil §§1545 --1553.

The above cited material is particularly on point since appellants Titzman and Qualls were sued in their representative capacities only, appellant Titzman having been dismissed from the original action due to the mootness of the action to him. Appellants have no substantive rights to be enforced in this matter, are not the real parties and have no justiciable interest or standing to maintain this appeal. "Merely because one may benefit by result in litigation does not make him the 'real party in interest' within the purview of the rule...." Armour Pharmaceutical Co. v. Home Insurance Co., 60 F.D.R. 592, 594 (N.D.Ill. 1973).

Even if appellants could allege some benefit from the outcome of an appeal, they

are still not considered interested parties under any stretch of the legal reasoning. The weight of case law is against them. Horwich v. Price, 25 F.R.D. 500, 502 (W.D.Mich. 1960); Racc v. Baker, 28 F.R.D. 354, 355-356, (N.D. Ind. 1961); Celanese Corp. of America v. John Clark Industries, Inc., 243 F.2d 880, 882 (5th Cir. 1957); Allen v. Baker, 327 F. Supp. 706, 710 (N.D.Miss. 1968). Indeed, an interested party must possess a significant interest in order to be a real party in interest to any litigation. "The meaning and object of the real party in interest principal...is that the action must be brought by the person who possesses the claim and who has a significant interest in the litigation." Virginia Electric and Power Co. v. Westinghouse Electric Corp., 485 F.2d 78, 83 (4th Cir. 1973). The Virginia Electric case is particularly applicable since, in the instant case, the only party

"who possesses the claim and who has significant interest" in reversal of the lower court's decision, the City of Pleasanton, has not appealed.

It is also conceivable that the decision of a final appeal could work an injustice upon appellees because the true interested party has not joined this appeal. The purpose of Federal Rules of Civil Procedure, R.17(a) is to protect parties against a subsequent action on a cause previously adjudicated. United Federation of Postal Clerks, AFL-CIO v. Watson, 409 F.2d 462, 470 (D.C. Cir. 1969). See also: Prevor-Mayersohn Caribbean v. Puerto Rico Marine, 620 F.2d 1, 4 (5th Cir. 1980).

Both Appellants were made parties to the suit in their representative capacities. Appellant Titzman was dismissed at trial because as election judge of an election that had already been held, the case was moot as to him. Appellant Qualls, as Mayor of the

Defendant City, was not dismissed at trial but absolutely has no interest in this case separate and apart from the City's interest. To permit Appellant Qualls to maintain this appeal individually, against the decision of a majority of the City's governing body, would perpetuate the majority rule of the City's Anglo establishment struck down by the trial court, and would frustrate the Congressional intent of the statute in question.

Neither party has been injured in any way. In order for appellants to gain standing, they must allege "a distinct and palpable injury to (themselves)...." Hope, Inc. v. The County of DuPage, 717 F.2d 1061 (7th Cir. 1983). See also: Southwestern Media, Inc. v. Albert M. Bau and Henry Jacobowitz, 708 F.2d 419 (9th Cir. 1983), (appellant dismissed for lack of standing because not a party to the original proceedings); In re Central States Electric Corp., 206 F.2d 70 (4th Cir. 1953),

(petitioners dismissed for not being party t original suit).

Of particular noteworthiness in the instant case in the ruling in Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). The United States Courts of Appeals for the District of Columbia Circuit dismissed two appellants for failure to allege any personal interest, and therefore, for lack of standing to appeal. Hanson, a resigned superintendant of schools for the District of Columbia, and Smuck, a former member of the D.C. Board of Education, appealed an order from a suit against the board of education. The Board itself did not join the appeal, only Hanson and Smuck who were named in the original suit in their representative capacities appealed. The court allowed the intervention of school district parents as appellants but dismissed Hanson and Smuck. Id. at 179.

The court reasoned that Smuck and Hanson had no appealable interest apart from the

school board, which had decided not to appeal. "Appellant Smuck had a fair opportunity to participate in (the board's) defense, and in the decision not to appeal. Having done so, he has no separate interest as an individual in the litigation." Id.

Appellants Titzman and Qualls are in a remarkably similar situation in the instant case. The City of Pleasanton, the true protagonist, is absent from the case. Qualls, as Mayor of Pleasanton, was in a position to persuade the city to appeal. The city has not appealed and the appellants find themselves with no separate interest in this litigation. See generally: Elterich v. Arndt, 27 P.2d 1102 (9th Cir. 1933); State ex rel. Erb v. Sweaas, 107 N.W. 404 (1906).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal herein be dismissed.

Dated: March 13, 1984

Respectfully submitted

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CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed, certified mail, return receipt requested, to Robert M. Roller, GRAVES, DOUGHERTY, HEARON & MOODY, 2300 Interfirst Tower, P. O. Box 98, Austin, Texas 78767, on this the 16 day of February, 1984.

HARVEY L. HARDY

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